No. 285

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Supreme Court of the United States.

OCTOBER TERM, 1945.

HERBERT O. DUNN AND JOHN A. CADARIO,
Petitioners,

v.

TOWN OF BURLINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, MASSACHUSETTS,

AND

BRIEF IN SUPPORT THEREOF.

JOHN H. DEVINE,
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Supreme Court of the United States.

OCTOBER TERM, 1945.

HERBERT O. DUNN AND JOHN A. CADARIO,
Petitioners,

v.

TOWN OF BURLINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

The petitioners, Herbert O. Dunn and John A. Cadario, pray that a writ of certiorari may issue to review the decree of the Superior Court in and for the County of Middlesex entered June 11, 1945, in the case between the above-named parties docketed therein as No. 13195 Equity (Rec. p. 20). Said decree was entered pursuant to opinion with rescript from the Supreme Judicial Court of Massachusetts, entered May 7, 1945, docketed in said court as No. 4453 (Rec. p. 19).

Statement of Matter Involved.

The Town of Burlington brought a bill in equity to enjoin your petitioners, Herbert O. Dunn and John A. Cadario, from removing loam and topsoil from two parcels of land owned by your petitioners and located in the respondent Town of Burlington, Massachusetts (Rec. pp. 1-4). The said town stated in its bill of complaint that the removal of the loam and topsoil was a violation of the town zoning by-law in that it was a nonconforming use of land in a so-called Residence B area, as described in the town zoning by-law (Rec. pp. 3-4). The case was heard by a judge of the Superior Court of Middlesex County, who ordered a decree for the plaintiff and reported the case to the Supreme Judicial Court of Massachusetts (Rec. pp. 1, 12).

The Supreme Judicial Court sustained the trial judge and ordered a decree to be entered granting the respondent town the relief sought (Rec. p. 19).

At various appropriate stages of the proceedings in the Superior Court and in the Supreme Judicial Court your petitioners challenged the validity of the zoning by-law of the respondent town on the ground that, if it was construed to prohibit their right to remove loam and topsoil from their premises, then it was unconstitutional as in violation of the 14th Amendment to the Federal Constitution. The validity of the by-law was attacked by the pleadings (Rec. pp. 5-6), by oral argument and request to rule in the Middlesex Superior Court, and by arguments in the Supreme Judicial Court. The federal constitutional question now presented was passed upon by the Supreme Judicial Court in its opinion, pp. 600-603 in 1945 Massachusetts Advance Sheets (Rec. pp. 15-18).

A certificate of the Chief Justice of the Supreme Judicial Court of Massachusetts, the original of which is on

file with the Clerk of the Supreme Court of the United States, indicating that the federal question of due process was argued before and determined by that court, is as follows:

"SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

Middlesex, ss: No. 4453
In Equity

TOWN OF BURLINGTON
vs.
HERBERT O. DUNN and JOHN A. CADARIO

CERTIFICATE OF THE CHIEF JUSTICE AS TO CONSTITUTIONAL QUESTION ARGUED AND DETERMINED

I, Fred T. Field, Chief Justice of the Supreme Judicial Court of Massachusetts, hereby certify that at the argument of the above-entitled case the defendants presented to this Court the question of the constitutionality of the zoning by-law of the Town of Burlington in so far as it prohibited loam removal. In support of this contention that such a by-law was unconstitutional cases decided under the due process clause of the federal Constitution were relied on. *Pennsylvania Coal Co.* vs. *Mahon,* 260 U. S. 393 was one of these cases. In the opinion of the Supreme Judicial Court of Massachusetts, reported at pages 597-604 of the 1945 Massachusetts Advance Sheets, we pointed out that in our opinion the case of *Pennsylvania Coal Co.* vs. *Mahon,* 260 U. S. 393 did not apply, and held that such regulation was constitutional. In support of our conclusion we cited many cases involving the reasonableness of regulations in the use of land, which

cases involved the question of the possible violation of the due process clause of the Federal Constitution. We, therefore, held that in our opinion such a regulation of loam removal did not violate the Federal Constitution.

FRED T. FIELD
Chief Justice, Supreme Judicial Court.

I, Walter F. Frederick, Clerk, Supreme Judicial Court of Massachusetts, hereby certify that the above certificate was prepared and signed by Fred T. Field, Chief Justice of said Court.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court this eleventh day of July in the year of our Lord one thousand nine hundred forty-five.

(Seal) WALTER F. FREDERICK"

Statutes Involved.

The pertinent provisions of the statute involved in this case, which authorized cities and towns to pass zoning by-laws, is Massachusetts General Laws (Ter. Ed.) c. 40, §§ 25, 26 and 27, as set forth in appendix, *infra*, pp. 22-25. The zoning by-law involved, so far as material to the present controversy, is contained in the Record at pp. 3-4.

Jurisdiction.

The opinion of the Supreme Judicial Court was entered on May 7, 1945 (Rec. p. 13). The final decree in the Middlesex Superior Court was entered June 11, 1945 (Rec.

p. 20). The jurisdiction of this court is invoked under Judicial Code, § 237, as amended, 28 U.S.C. § 344(b).

Question Presented.

Briefly stated, the question presented is whether the Massachusetts Legislature in delegating to cities and towns the right to pass by-laws regulating the use of land could, without violating the 14th Amendment to the Federal Constitution, authorize a regulation of the use of land solely for aesthetic reasons.

Reasons Relied on for Allowance of Writ.

The petitioners respectfully contend that the writ of certiorari should be granted to review and reverse the decree of the Middlesex Superior Court for the following reasons:

1. That the Supreme Judicial Court of Massachusetts committed error in ordering a decree to be entered restraining your petitioners from removing the topsoil or loam from their land because—

(*a*) The Massachusetts Legislature had no right to and could not delegate to cities and towns the right to pass zoning by-laws which could be construed to prohibit the owner of land from removing topsoil or loam therefrom.

(*b*) A zoning by-law which is interpreted to prohibit such removal of loam or topsoil violates, by such interpretation, your petitioners' right to their property as guaranteed by the 14th Amendment to the Federal Constitution.

2. That the Supreme Judicial Court of Massachusetts has decided an important question involving the constitutional right of the owner of land to remove the loam or topsoil therefrom for sale or otherwise.

3. That the decision of the Supreme Judicial Court of Massachusetts on this question is apparently in conflict with the decisions of this Honorable Court in the case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, and the case of *Village of Terrace Park* v. *Errett,* 12 Fed. (2d) 240, certiorari denied, 273 U.S. 710, as well as in conflict with decisions of many other federal and state courts.

4. That the constitutional right of a landowner to remove loam and topsoil from his premises is one which is constantly arising, as evidenced by the many cases involving the question.

5. That the constitutional question involved in this case, being one of general and continuing interest and of nationwide importance, should now be finally decided and determined by this Honorable Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Superior Court in and for the County of Middlesex, Massachusetts, demanding that court to certify and to send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 13195 Equity, *Town of Burlington* v. *Herbert O. Dunn et al.,* and that the decree of the Superior Court in and for the County of Middlesex, Massachusetts, entered in accordance with the rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts, may be reversed by this Honorable Court and that the bill may be dismissed

and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JOHN H. DEVINE,
FRANK G. VOLPE,
Attorneys for Petitioners.

Of Counsel:
DEVINE, YORK & VOLPE,
J. RAYMOND SPENCE.

Supreme Court of the United States.

OCTOBER TERM, 1945.

HERBERT O. DUNN AND JOHN A. CADARIO,
Petitioners,

v.

TOWN OF BURLINGTON,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
Opinion of the Court Below.

The opinion of the Supreme Judicial Court of Massachusetts appears in the 1945 Massachusetts Advance Sheets, pp. 597-604. It is printed in the Record at pp. 13-19.

II.
Jurisdiction.

The opinion of the Supreme Judicial Court was entered on May 7, 1945 (Rec. p. 13). Final decree of the Middlesex Superior Court was entered June 11, 1945 (Rec. p. 20). The jurisdiction of this court is invoked under Judicial Code, § 237, as amended, 28 U.S.C. § 344(b).

III.
Statement of the Case.

As stated in the petition, the question presented is whether the Massachusetts Legislature, in delegating to cities and towns the right to pass zoning by-laws regulating the use of land, could, without violating the 14th Amendment to the Federal Constitution, authorize a regulation of the use of land which results in prohibiting the owner of the land from removing the loam or topsoil therefrom for sale or otherwise.

IV.
Specification of Errors.

The petitioners contend that the Supreme Judicial Court of Massachusetts erred in ordering a decree restraining your petitioners from removing loam or topsoil from their land, for the reason that no state, nor its subdivisions, has a right to interfere with property solely for aesthetic reasons, in that interference for such reasons violates the 14th Amendment to the Federal Constitution.

V.
Argument.

IF THE ZONING BY-LAW OF THE RESPONDENT TOWN OF BURLINGTON IS INTERPRETED TO MEAN THAT UNDER ITS PROVISIONS A LANDOWNER CANNOT REMOVE THE LOAM AND TOPSOIL FROM HIS PREMISES FOR SALE OR OTHERWISE, THEN THE ZONING BY-LAW AS THUS INTERPRETED IS UNCONSTITUTIONAL AS BEING A VIOLATION OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION.

The Supreme Judicial Court of Massachusetts in passing upon the question now presented pointed out, at page

600 of the opinion in the 1945 Massachusetts Advance Sheets, that this Honorable Court has many times passed upon the constitutionality of zoning by-laws. See, for example:

Zahn v. *Board of Public Works,* 274 U.S. 325.
Nectow v. *Cambridge,* 277 U.S. 183.

The Massachusetts court in its opinion, however, further points out at page 600 of the 1945 Massachusetts Advance Sheets:

> "It is true that art. 60 of the Amendments to the Constitution of the Commonwealth expressly authorizing building zones in cities and towns does not apply to vacant lands, but it by no means follows that the uses of vacant lands cannot be regulated to a reasonable extent and in a reasonable manner for the promotion of the public health, safety, morals or welfare. This possibility, quite apart from art. 60, was, in effect, recognized in one of the very earliest judicial expressions on the subject, *Opinion of the Justices,* 234 Mass. 597, 602, 603, before the first zoning statute in this Commonwealth was enacted. See also *Brett* v. *Building Commissioner of Brookline,* 250 Mass. 73, 77. And the constitutionality of zoning statutes which have been held valid under the Federal Constitution and in many of the States does not depend upon art. 60 or upon any equivalent express constitutional provision."

Conceding, then, that a regulation of a mere use of land wholly apart from the use of structures thereon may in certain circumstances be proper, the significant question is how far a state may go in such regulation without violating the due process clause of the Federal Constitution.

The Supreme Judicial Court of Massachusetts in its opinion in the present case at pages 601 to 603 of the 1945 Massachusetts Advance Sheets has enumerated certain reasons to support the conclusion that the removal of loam and topsoil is a reasonable regulation of the use of land under zoning laws and that your petitioner may properly be enjoined. But no case involving the removal of loam or topsoil is cited by the Massachusetts court in support of this position save *Lexington* v. *Menotomy Trust Co.*, 304 Mass. 283, in which case the constitutional aspect of the question was not passed upon.

The cases cited by the Massachusetts Supreme Judicial Court to sustain a regulation of the right to remove loam from land are all cases involving the use of structures in connection with the removal of the component parts of the land or situations involving danger to the public welfare which could not possibly exist in the case of loam removal.

The Massachusetts Supreme Judicial Court points out at page 601 of the 1945 Advance Sheets that there is apt to be noise and dust in connection with the removal of the loam or topsoil. There is no evidence in the record of this fact nor is there any evidence that the removal of the loam would take a considerable period of time as stated in the opinion. As a matter of fact the loam could be removed in a very short space of time. The Town of Burlington in its bill of complaint claimed the existence of a nuisance, but the court was unable to find anything approaching the existence of a nuisance. The record shows that noise of a steam shovel coming from the general direction where the steam shovel of the defendants was operating was heard by two residents of the town who lived about one mile from the place of operation. There was no evidence of the extent or degree of this noise or that it actually came from the steam shovel of the defendants (Rec. p. 10). The rec-

ord also shows that for approximately the last twenty years the pit had been used for the removal of gravel and that the plaintiff town itself took gravel from that pit to repair its roads and carted the gravel away in trucks (Rec. p. 10).

The Massachusetts court also points out at page 601 that the soil is destroyed for agricultural uses. But while the soil at that particular place might be ruined for agricultural uses, the soil as such is not destroyed for agricultural purposes, nor does the regulation purport to be for agricultural purposes. Certainly the state would not have the right to prohibit a man from rendering his land useless for agricultural purposes until such time as it is shown that there would be no other soil which could be used to raise agricultural products to feed the people of the community. Every time a building is put up, the area occupied by the building necessarily is destroyed for agricultural purposes. When loam or topsoil is removed from a particular piece of land, the loam is moved to another place, which, if public necessity demanded, could be used for agricultural purposes. Until the removed soil is actually destroyed, it is still potential agricultural soil wherever it may be placed.

The Massachusetts Supreme Judicial Court speaks about the obligation and duty of towns to maintain roads by such premises after the loam has been removed, but cities and towns today are under obligation to maintain roads through many forests and field areas which have little or no value. The purposes of many of these roads are to enable commerce to take place between the various cities and towns and states and they are not maintained primarily for the benefit of a particular landowner. The fact that the town may wish to maintain roads for these purposes has nothing to do with the right of a particular property owner to use his land in any way that he wishes.

The Massachusetts Supreme Judicial Court at page 601 of the opinion speaks of the unsightly effect of the removal of the soil, and that is the crux of this case. This argument is based solely on aesthetic grounds and it has been many times held that aesthetic considerations are not sufficient basis for interference with property rights.

Welch v. *Swasey,* 214 U.S. 91.
St. Louis Poster Adv. Co. v. *St. Louis,* 249 U.S. 269.

As was said in *Nectow* v. *Cambridge,* 277 U.S. 183, 188:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

Plainly and obviously the prohibition of loam removal has no substantial relation to the public health, safety, morals or general welfare. Nor do the cumulative reasons set forth by the Massachusetts Supreme Judicial Court to justify the right of a city or town to prohibit loam removal of themselves justify the interference with the property rights of the petitioner to remove the loam or soil from their land.

Basically and fundamentally the objections to loam removal are that the land after the removal may be regarded as unsightly. That is the dominant reason cities and towns and your present respondent have tried to stop this loam removal. The basis of this objection is an aesthetic one pure and simple despite all arguments and

contentions to the contrary, and, as this Honorable Court and many other courts have said, such aesthetic considerations are not enough to interfere with the property rights of an individual.

Welch v. *Swasey,* 214 U.S. 91.
St. Louis Poster Adv. Co. v. *St. Louis,* 249 U.S. 269.
Varney & Green v. *Williams,* 155 Cal. 318.
Farist Steel Co. v. *Bridgeport,* 60 Conn. 278.
City of Sturgeon v. *Wabash Rwy. Co.,* 223 Mo. App. 633.
Cordts v. *Hutton Co.,* 146 Misc. 10, 262 N.Y.S. 539.
Bryan v. *Chester,* 212 Pa. 259.

The general welfare is not adversely affected by your petitioner's going on the premises and removing the loam or topsoil. This is not like an oil well, where there may be structures and fire hazards and noxious gases, or even a granite quarry, where explosives might be used. No important concern of the public welfare can possibly be advanced to deprive a landowner of the right to do with the loam and soil on his land what he desires. As was said in *Town of Harrison* v. *Sunny Ridge Builders,* 7 N.Y.S. (2d) 521, 522, where the court was directly passing on the rights of a landowner to remove topsoil:

> "It may be that such disposition of topsoil constitutes an unneighborly act, but whether the foregoing be true or not the court is bound to respect the rights of a landowner in his property."

Likewise, in *Town of Harrison* v. *Sunny Ridge Builders,* 8 N.Y.S. (2d) 632, the court, in considering an ordinance

passed by the Town of Harrison prohibiting the removal of loam, said at page 635 of its opinion:

> "First, is the ordinance last adopted prohibiting the removal of topsoil a valid exercise of police power? In my opinion it is not. It is not intended that its enforcement will promote either the public safety, health, morals or general welfare of the people of the town. The removal of topsoil from large acreages or plots immediately adjoining a residential section, otherwise highly restricted undoubtedly affects the aesthetic sense, but there seems to be a dearth of authority that statutes or ordinances can be passed when aesthetic reasons are their sole purpose. Not only does the ordinance prohibit the removal of topsoil but it prohibits the excavation or the removal of sand, stone, earth or gravel from any land in the town under certain conditions. The general proposition must still pertain in spite of the serious incursions made upon it by recent legislation that the owner of the property has a constitutional right to make any use of it that he desires so long as it does not affect the safety, health, comfort or general welfare of the community. It is not even contended here that the removal of the topsoil constitutes a nuisance. It has been held that an ordinance, to preserve the vista to private property, cannot be justified under the police power. . . . A statute prohibiting the excavation of sand, stone, gravel and topsoil of itself is an unconstitutional exercise of legislative power. See *Bartsch* vs. *Ragonetti,* 123 Misc. 903; 207 N.Y.S. 142, affirmed by App. Div. 214, App. Div. 799, 210 N.Y.S. 825; *People* vs. *Linabury,* 209 N.Y.S. 126. The authorities of other jurisdictions are consistent therewith, namely *Pennsylvania Coal Co.* vs. *Mahon,* 260 U.S. 393; *People* vs.

Hawley, 207 Cal. 395; *Stone* vs. *Kendall,* Tex. Cov. App. 268 S.W. 759; *Lamb* vs. *A. D. McKee, Inc.,* 10 N. J. Misc. 649."

The principles announced in the foregoing quotations are singularly applicable to the facts in the present case. As pointed out in the *Sunny Ridge Builders* case, the reasons for the objections to loam removal purely and simply are aesthetic, and as pointed out in that case such reasons are not sufficient to interfere with the right of a man to remove the loam from his premises. To deprive a man of his property rights for such a reason plainly violates the 14th Amendment to the Federal Constitution.

In addition the right of your petitioners to remove the loam and topsoil from their land is plainly established by the case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393. In that case this Honorable Court held that a state statute which forbade mining in such a way as to cause a subsidence of any human habitation or public street or building was unconstitutional as a violation of the due process clause of the 14th Amendment to the Federal Constitution. This decision has never been overruled, and while it did not concern a zoning law, the principles announced therein support the contention of your petitioners of their right to remove the loam and topsoil from their land.

Likewise, in *Village of Terrace Park* v. *Errett,* 12 Fed. (2d) 240, certiorari denied, 273 U.S. 710, a similar result was reached. It was there held that a zoning ordinance which prohibited the operation of a gravel pit in a residence area was unconstitutional as being in violation of the due process clause of the Federal Constitution. The Circuit Court relied upon the *Pennsylvania Coal Co.* case as authority for the result which it reached.

The foregoing decisions just cited present factual situations which are even less strong than the facts now before the court. In both the *Pennsylvania Coal Co.* case and the *Village of Terrace Park* case some structures were involved, but in the present case, as the record shows, your petitioners employ no structures whatever in removing the loam and topsoil.

An analysis of decisions from many other jurisdictions indicates that courts generally have vigorously guarded the right of a landowner to remove the component parts of his land, whether they be sand, gravel, loam or granite.

In the case of *In re Kelso,* 147 Cal. 609, it was held that the prohibition of a granite quarry was improper, as a taking of property without due process.

In the case of *In re Throop,* 169 Cal. 93, it was held that a granite quarry which turned out crushed stone could not be interfered with.

In *People* v. *Hawley,* 207 Cal. 395, it was held that excavating rock and gravel might not be interfered with. The court cited the *Pennsylvania Coal Co.* case in connection with the result which it reached.

In *Anderson* v. *Jester,* 206 Iowa, 452, the court held that the right to dig out the coal could not be arbitrarily interfered with. The *Pennsylvania Coal Co.* case was again cited.

In *Bartsch* v. *Ragonetti,* 123 Misc. 903, 207 N.Y.S. 142, affirmed 214 App. Div. 799, 210 N.Y.S. 825, it was held that a zoning regulation limiting the right to remove sand from property was unconstitutional.

In *People* v. *Linabury,* 209 N.Y.S. 126, it was held that a zoning ordinance depriving a property owner of the right to remove valuable material such as sand therefrom was unconstitutional as it deprived him of his property without compensation.

In *Stone* v. *Kendall* (Tex. Civ. App.) 268 S.W. 759, it was held that an ordinance prohibiting excavating within a municipality for the purpose of removing dirt or gravel or any other natural substance was unenforceable, as arbitrary and an unwarranted limitation on the lawful use of private property.

It is true that in the case of *Marblehead Land Co.* v. *City of Los Angeles,* 47 Fed. (2d) 528, certiorari denied, 284 U.S. 634, a divided court reached a result which imposed some limitations on the right of a landowner to remove the component parts of his land. In that case it was held that a zoning ordinance declaring oil-well drilling operations illegal within certain residence areas, which repealed a former ordinance excepting such land from the district, was valid. So far as the principles announced in this case may be applicable in the case at bar, it may be first pointed out that oil-well drilling necessarily involves the use of structures. This fact would immediately distinguish that case from the case at bar. Also the considerations of public welfare involved in connection with a regulation of oil drilling do not remotely exist in the case of loam removal. The danger of fire from oil wells as well as the existence of noxious gases is obvious and is a consideration which might well prompt the result which was reached in the *Marblehead Land Co.* case. It may further be noted that in the *Marblehead Land Co.* case the majority discussed *Pennsylvania Coal Co.* v. *Mahon* without really distinguishing it in any way. The dissent in this case relies on the *Pennsylvania Coal Co.* case.

The importance of this decision in the *Pennsylvania Coal Co.* case is at once apparent and is one of the primary bases for the petition in the present case.

The case of *Laurel Hill Cemetery* v. *San Francisco,* 216 U.S. 358, does not militate against the contention of your

present petitioners. That case involved a regulation of a cemetery in a city, and manifestly considerations of health were the basis for the decision. No such factors enter into the case at bar.

Hadacheck v. *Los Angeles,* 239 U.S. 394, likewise is distinguishable from the present case. In that case it was held that an ordinance prohibiting the manufacturing of bricks within a specified section of a municipality was a constitutional exercise of the police power, but the significant point in connection with that case to be noted is that the court definitely raised the question whether the city could prohibit the digging of clay from the land and moving it to another place to be manufactured into brick. The court clearly suggested that the prohibition of the mere digging of the clay and moving it from the land would be an unconstitutional deprivation of property without due process of law.

In the light of the foregoing authorities and particularly the case of *Pennsylvania Coal Co.* v. *Mahon* it seems that to construe the zoning by-law in the present case to prohibit the removal of loam and soil by your petitioners is an unconstitutional exercise of the police power. It is apparent from the opinion of the Massachusetts Supreme Judicial Court and in the light of the facts of the record that the result which was reached was based fundamentally on aesthetic considerations, and those, it is well established, are plainly not enough to restrict a person from the use of his property.

This Honorable Court, therefore, should now pass finally and authoritatively on the basic question involved in this case, which is: May a state interfere with the property rights of an individual where the basic reasons for such interference are purely aesthetic?

VI.
Conclusion.

In accordance with the foregoing authorities and for the reasons stated, it is urged that the writ of certiorari should issue, in order that a full and authoritative decision by this Honorable Court may resolve this important question.

Respectfully submitted,

JOHN H. DEVINE,
FRANK G. VOLPE,
Attorneys for Petitioners.

Of Counsel:
DEVINE, YORK & VOLPE,
J. RAYMOND SPENCE.

Appendix.

MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 40, SECTIONS 25-27 (AS REVISED BY ACTS OF 1933, CHAPTER 269, AND ACTS OF 1943, CHAPTER 320).

SECTION 25. *Limitation of particular classes of buildings, etc.* For the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants, any city, except Boston, and any town, may by ordinance or by-law regulate and restrict the height, number of stories, and size of buildings and structures, the size and width of lots, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

For any or all of such purposes such an ordinance or by-law may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of sections twenty-five to thirty A, inclusive, and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings and structures, or use of land, and may prohibit noxious trades within the municipality or any specified part thereof. All such regulations and restrictions shall be uniform for each class or kind of buildings, structures or land, and for each class or kind of use, throughout each district, but the regulations and restrictions in one district may differ from those in other districts.

Such regulations and restrictions shall be designed among other purposes to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the over-crowding of land; to avoid undue concentration of population; to

facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and to increase the amenities of the municipality.

Due regard shall be paid to the characteristics of the different parts of the city or town, and the ordinances or by-laws established hereunder in any city or town shall be the same for zones, districts or streets having substantially the same character; and such regulations and restrictions shall be made with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city or town.

SECTION 26. *Ordinance or by-law not to apply to existing structures. Exception.* Such an ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the existing use of any building or structure, or of land to the extent to which it is used at the time of adoption of the ordinance or by-law, but it shall apply to any change of use thereof and to any alteration of a building or structure when the same would amount to reconstruction, extension or structural change, and to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent. Such an ordinance or by-law may regulate non-use of non-conforming buildings and structures so as not to unduly prolong the life of non-conforming uses. A building, structure or land used or to be used by a public service corporation may be exempted from the operation of such an ordinance or by-law if, upon petition of the corporation, the department of public utilities shall, after public notice and hearing, decide that the present or proposed situation of the building, structure or land in question is reasonably necessary for the convenience or welfare of the public.

SECTION 27. *Modification of by-laws, etc.* Such ordinances or by-laws may be adopted and from time to time be changed by amendment, addition or repeal, but only in the manner hereinafter provided. No ordinance or by-law originally establishing the boundaries of the districts or the regulations and restrictions to be enforced therein, and no ordinance or by-law changing the same as aforesaid, shall be adopted until after the planning board, if any, or, in a town having no such board, the board of selectmen, has held a public hearing thereon after due notice given and has submitted a final report with recommendations to the city council or town meeting, or until twenty days shall have elapsed after such hearing without the submission of such report; provided, that, in case of a proposed ordinance or by-law originally establishing the boundaries of the districts or the regulations and restrictions to be enforced therein, it shall be sufficient if a public hearing is held and a final report with recommendations is submitted by a zoning board appointed for the purpose by the city council or selectmen or twenty days elapse after such hearing without such report being submitted. No such ordinance as proposed to be originally established or changed as aforesaid shall be adopted until after the city council or a committee designated or appointed for the purpose by it has held a public hearing thereon, at which all interested persons shall be given an opportunity to be heard. At least twenty days' notice of the time and place of such hearing before the city council or committee thereof shall be published in an official publication, or a newspaper of general circulation, in the municipality. After such notice, hearings and report, or lapse of time without report, a city council or town meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law. No change of any such ordinance or by-law shall be adopted except by a two thirds vote of all the members of the city council

where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two thirds vote of a town meeting; provided, that in case there is filed with the city clerk prior to the close of the first hearing before the city council or committee thereof a written protest against such change, stating the reasons, duly signed by the owners of twenty per cent or more of the area of the land proposed to be included in such change, or of the area of the land immediately adjacent, extending three hundred feet therefrom, or of the area of other land within two hundred feet of the land proposed to be included in such change, no such change of any such ordinance shall be adopted except by a unanimous vote of all the members of the city council, whatever its form, if it consists of less than nine members or, if it consists of nine or more members, by a three fourths vote of all the members thereof where there is a commission form of government or a single branch, or of each branch where there are two branches.

When such by-laws or any changes therein are submitted to the attorney general or approval as required by section thirty-two, there shall also be furnished to him a statement explaining clearly the by-laws or changes proposed, together with maps or plans, when necessary.